



1 general. Reporter Betty Koharski recorded the proceedings.

2 Witnesses were sworn and testified. Exhibits were examined. From  
3 testimony heard and exhibits examined, the Pollution Control Hearings  
4 Board makes these

## 5 FINDINGS OF FACT

### 6 I

7 This matter concerns property in Montesano located between the  
8 downtown area and the freeway (SR 12). The land except for the filled  
9 portion is all or partially covered by water during most of the year  
10 and may be accurately described as marshland. Drainage is meager but  
11 tends to be in a southerly direction. The construction of a banked  
12 on-ramp to the freeway in 1969 hampers this drainage causing slightly  
13 more water in the marshland over the course of any given year.  
14 Culverts located in the on-ramp facilitate drainage from the site.

15 In 1973, appellant, We-Did-It, Inc., purchased the property, a  
16 portion of which had previously been filled with the waste from cedar  
17 mills known as cedar "spalts." Appellant continued filling with the  
18 same wood waste material with the object of creating a filled, paved,  
19 office or commercial complex over the entire property. Appellant did  
20 not possess a solid waste disposal permit, see chapter 70.95 RCW,  
21 during this period when it conducted extensive filling with wood waste.

### 22 II

23 In response to citizen complaints that appellant's wood waste fill  
24 was being conducted without a solid waste disposal permit, a meeting  
25 was held on the site on April 26, 1978. Present were officials of the  
26 appellant, the respondent Department of Ecology (DOE), and the Grays  
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1 Harbor-Pacific Health District. On that date the fill had progressed  
2 to a point roughly even with a culvert in the freeway on-ramp  
3 identified as "culvert B" in this record.<sup>1</sup> As a result of the  
4 meeting, appellant agreed to apply for a solid waste disposal permit.  
5 On October 6, 1978, the Grays Harbor-Pacific Health District issued a  
6 solid waste disposal permit with the following condition:

- 7 1. Dike west end of fill from R.R. tracks on North to property  
8 line on South. Until this is done, filling will be not expanding  
9 (sic) in area.

10 Appellant understood this ambiguous language to require a dike on the  
11 west property boundary. Respondent and the Health District understood  
12 that language to require a dike even with culvert B which location is  
several hundred feet back from (east of) the west property boundary.  
14 Within the time allowed by the solid waste disposal permit, and in  
15 plain view, appellant constructed a dike consisting of gravel,  
16 underlain with wood waste, along the west property boundary. It then  
17 completed its wood waste fill to this boundary dike. Appellant also  
18 constructed a southern dike on the southern boundary.

19 III

20 Both appellant's west and south dikes leak, thus allowing water to  
21 leach through the wood waste removing its soluble constituents. The  
22 leachate turns the water black in the marshland outside the dike, and  
23 is harmful to fish and wildlife.

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26 1. This is the culvert referred to in the paragraph numbered 1.  
of the Order now before us, Docket DE 79-512, First Amendment.

1 The leaching problem is apparently aggravated by the discharge of  
2 a City of Montesano storm sewer directly into the fill. The existence  
3 of the sewer was unknown to appellant when the sewer was covered by  
4 the fill. A dispute exists over the City's right to discharge such  
5 storm sewer waters within the bounds of appellant's property.

6 IV

7 On February 29, 1980, pursuant to notices commencing in September,  
8 1979, DOE issued an Order, DE 79-512, First Amendment, to appellant as  
9 follows:

10 IT IS ORDERED THAT We-Did-It, Inc., shall, upon  
11 receipt of this Order, take appropriate action in  
accordance with the following instructions:

12 Submit plans and specifications for  
13 modification, adequate cover and dike containment  
14 for the fill described in the Notice of Violation  
15 dated October 12, 1979, within thirty (30) days to  
the Department of Ecology Southwest Regional  
Office. The plans and specifications shall address  
the following:

- 16 1. Removal of all fill that lies westerly of the  
17 culvert under the freeway on-ramp (culvert  
described in DOT plans as Code 6-3, Station DC3  
14+00).
- 18 2. Construction of an impervious containment dike  
19 at the westerly edge of the remaining fill.  
20 The dike is to be completely east of the  
described culvert and run northwesterly on a  
21 line with the culvert.
- 22 3. Construction of an impervious containment dike  
on the southerly side of the fill.
- 23 4. Capping of the entire fill with an impervious  
24 material.<sup>2</sup>

25  
26 2. A subsequent solid waste disposal permit was issued by Grays  
Harbor-Pacific Health District on March, 7, 1980, containing nearly  
27 identical conditions.

1 This Order was based upon the premise that leachate was being  
2 discharged into the Chehalis River via the Sylvia Creek watershed.

3 Appellant stipulates that it will comply with the requirements to  
4 submit plans for impervious diking and capping of its wood waste  
5 fill. Appellant contests, however, the requirement to remove all fill  
6 back to culvert B and construct a west dike at that location.

7 V

8 Any Conclusion of Law which should be deemed a Finding of Fact is  
9 hereby adopted as such.

10 From these Findings the Board makes the following

11 CONCLUSIONS OF LAW

12 I

13 The Order before us for review, DE 79-512, First Amendment, is  
14 issued pursuant to RCW 90.48.120 of the Water Pollution Control Act on  
15 the theory that RCW 90.48.080 has been violated. This latter section  
16 provides:

17 90.48.080 DISCHARGE OF POLLUTION MATER IN WATERS  
18 PROHIBITED. It shall be unlawful for any person to  
19 throw, drain, run, or otherwise discharge into any  
20 of the waters of this state, or to cause, permit or  
21 suffer to be thrown, run, drained, allowed to seep  
22 or otherwise discharged into such waters any organic  
23 or inorganic matter that shall cause or tend to  
24 cause pollution of such waters according to the  
25 determination of the commissions, as provided for in  
26 this chapter.

27 "Waters of the state" is defined at RCW 90.48.020 to include  
"lakes, rivers, ponds, streams, inland waters, underground waters,  
salt waters and all other surface waters and watercourses within the  
jurisdiction of the State of Washington." This definition includes

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 the marshlands bordering appellant's dikes and fill. This is so  
2 whether or not the marshlands drain into the Chehalis River via the  
3 Sylvia Creek watershed, a point which was not proven in this case.

4 "Pollution" is defined at RCW 90.48.020 to include alteration of  
5 the color or biological properties of any water of the state as will  
6 or is likely to render such waters detrimental to wild animals, birds,  
7 fish or other aquatic life. This definition includes the effect  
8 which leaching from appellant's wood waste fill has upon the adjacent  
9 marshland.

10 Appellant has allowed leachate to seep into waters of the state so  
11 as to cause or tend to cause pollution of such waters, and thus has  
12 violated RCW 90.48.080.

## 13 II

14 Where, as here, any person shall violate or is about to violate  
15 RCW 90.48.080 prohibiting water pollution, DOE shall, after due  
16 notice, issue such order or directive as it deems appropriate under  
17 the circumstances. RCW 90.48.120. The Order before us, quoted in  
18 Finding of Fact IV, above, is issued under this authority. On review  
19 we evaluate the appropriateness of that Order based upon the  
20 circumstances established by the record and the prohibition of water  
21 pollution which is the goal of RCW 90.48.080.

22 The control or prohibition of water pollution is appropriately  
23 addressed by the provisions of the order requiring plans for  
24 impervious diking and capping of the wood waste fill. Such plans  
25 should be submitted and swiftly carried out. Nevertheless, we  
26 conclude that the order is overly broad in requiring plans to remove  
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1 the present fill lying west of culvert B and to re-dike the truncated  
2 fill at that location. We are unable to conclude that such removal of  
3 fill and re-diking will confer any significant added protection  
4 against water pollution from the seepage of leachate through the  
5 diking into the marshlands. The purpose of the statute is to prevent  
6 pollution of public waters. Department of Ecology's orders should be  
7 designed to achieve that purpose. The terms of the order requiring  
8 plans for fill removal and re-diking appear to exceed what is  
9 appropriate for the control of water pollution in this instance. An  
10 order which will require appellant to isolate its fill from the city  
11 sewer, the on-ramp culverts, and the marsh would be more appropriate.  
12 Therefore the Department of Ecology order should be remanded for  
reissuance with the following changes:

14 1. Paragraph numbered 1. shall be deleted.

15 2. Paragraph numbered 2. shall be deleted and an lieu thereof  
16 provision made to isolate the fill from the city sewer, on-ramp  
culverts, and the marsh.

17 3. The new order shall not merely require the submission of plans  
18 but shall in addition specifically require construction in accordance  
with plans approved by the Department of Ecology.

### III

19 The solid waste disposal permits issued by the Health District,  
20 and admitted into evidence here are not properly before us for  
21 review. These permits are not an order or decision of DOE or a local  
22 air pollution control authority, which are the bases of our subject  
23 matter jurisdiction. RCW 43.21B.110.

### IV

25 Any Finding of Fact which should be deemed a Conclusion of Law is

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 hereby adopted as such.

2 From these Conclusions the Board enters this

3 ORDER

4 Paragraphs numbered 1. and 2. of the Department of Ecology Order,  
5 DE 79-512, First Amendment, are reversed and the matter remanded for  
6 further consideration as set out in Conclusion of Law II. In all  
7 other respects, the Order is affirmed.

8 DONE at Lacey, Washington, this 31<sup>st</sup> day of July, 1980.

9 POLLUTION CONTROL HEARINGS BOARD

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11   
12 NAT W. WASHINGTON, Chairman

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DAVID AKANA, Member  
16 See attached concurring opinion  
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1 AKANA CONCURRENCE:

2 I concur with the Findings, Conclusions, and Order except for  
3 that portion of Conclusion of Law II which requires construction  
4 in accordance with an approved Department of Ecology plan (condition 3).  
5 Construction was not a requirement of the appealed order; accordingly,  
6 I would leave the timing of the construction of the plans to the  
7 Department's future discretion.

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10 DAVID AKANA, Member  
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18 FINAL FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER